

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LUIS ANDINO,

Plaintiff,

v.

DECISION AND ORDER
12-CV-852

JUDY CUMMINS, et al.,

Defendants.

The instant matter was referred to Magistrate Judge Hugh B. Scott pursuant to 42 U.S.C. §636(b)(1) for supervision of all pre-trial proceedings. Plaintiff has moved for leave to proceed *in forma pauperis* and for a preliminary injunction. (Dkt. Nos. 2 and 6) Due to the dispositive nature of screening claims pursuant to Sections 1915 and 1915A of Title 28 of the United States Code, the Magistrate Judge issued a Report and Recommendation with respect to both motions.

In the Report and Recommendation filed on June 19, 2013, Magistrate Judge Scott recommended that plaintiff's claims against Mary Doe, Nurse Feldman, Officer Rodriguez, Counselors Joe Warner, Nicole, Amana, Melissa, Jane Doe, Mental Health Director Jane Doe, ECCF Officers Clay and Purcell, County Executive Mark Polencarz and Terrance King, Director, Saving Grace Manor, should be dismissed with prejudice pursuant to Section 1915(e)(2)(B)(ii) because no claims were asserted against these defendants in the actual

complaint. The Magistrate Judge recommended allowing plaintiff to replead certain claims arising in 2009 to demonstrate that they are governed by a tolling provision under New York Law. Magistrate Judge Scott then recommended granting the *in forma pauperis* motion but only as to those claims or defendants that the Report and Recommendation does not recommend dismissing. The Magistrate Judge also recommended denying plaintiff's motion for a preliminary injunction as moot, since plaintiff is no longer housed at Erie County Correctional Facility, and because the relief requested is unavailable.

After this Court granted a number of plaintiff's requests for adjournments, plaintiff filed objections to the Report and Recommendation on February 4, 2014. (Dkt. No. 16) Since the motion to proceed *in forma pauperis* remains pending, and defendants have yet to be served, no responses from defendants are necessary.

Pursuant to 28 U.S.C. §636(b)(1), this Court must make a *de novo* determination of those portions of the Report and Recommendation to which objections have been made. Upon *de novo* review, and after reviewing plaintiff's objections, the Court hereby adopts Magistrate Judge Scott's findings in their entirety.

Accordingly, for the reasons set forth in Magistrate Judge Scott's Report and Recommendation, plaintiff's motion to proceed *in forma pauperis* is granted as to all claims and defendants which the Report and Recommendation does not

recommend dismissing, and denied as to all other claims and defendants. The claims against those defendants who are not mentioned in the actual complaint are dismissed. Plaintiff is granted leave to amend or replead the complaint, pursuant to Rule 15(a)(1) of the Federal Rules of the Civil Procedure, and is instructed to do so in the manner explained by Magistrate Judge Scott in the Report and Recommendation. Plaintiff's motion for a preliminary injunction is denied as moot and because the relief requested is unavailable.

Plaintiff shall file his amended complaint on or before April 7, 2014. The matter is referred back to Magistrate Judge Scott for further proceedings.

SO ORDERED.

Richard J. Arcara
HONORABLE RICHARD J. ARCARA
UNITED STATES DISTRICT JUDGE

Dated: March 5, 2014